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19 VERNON UNSWORTH,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

21 Plaintiff
22 v.
23 ELON MUSK,
24 Defendant.

Case No. 2:18-cv-08048-SVW (JCx)

**JOINT STIPULATION ON PLAINTIFF'S
MOTION TO COMPEL**

Hearing Date: Nov. 12, 2019
Time: 9:30 a.m.
Courtroom: 750
Discovery Cutoff: Sept. 13, 2019
Pretrial Conference: Nov. 25, 2019
Trial Date: Dec. 3, 2019

1 PLEASE TAKE NOTICE THAT on November 12, 2019, at 9:30 a.m. in
2 Courtroom 750 of the above-titled Court, Plaintiff Vernon Unsworth will move this
3 Court for an order granting Plaintiff's Motion to Compel pursuant to Fed. R. Civ. P.
4 37 and Local Rule 37. Plaintiff's Motion to Compel is made pursuant to this Notice
5 of Motion, the parties' Joint Stipulation on Plaintiff's Motion to Compel and
6 supporting declarations, Plaintiff's forthcoming supplemental memorandum of law
7 and proposed order pursuant to Local Rule 37-2.3, and any such additional argument
8 or materials as may be submitted to the Court before the time of the decision in this
9 matter.

10

11

DATED: October 14, 2019

Respectfully submitted,

12

L. LIN WOOD, P.C.

13

By: /s/L. Lin Wood

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L. Lin Wood

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Attorneys for Plaintiff Vernon Unsworth

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1 Pursuant to Rule 37 of the Local Rules of Practice for the United States District
 2 Court for the Central District of California, Plaintiff Vernon Unsworth (“Unsworth”)
 3 and Defendant Elon Musk (“Musk”) submit this Joint Stipulation in connection with
 4 Unsworth’s Motion to Compel discovery responses from Musk in this defamation
 5 lawsuit.

6 **I. PRELIMINARY STATEMENTS.**

7 **A. Unsworth’s Preliminary Statement**

8 Unsworth has sued Musk for defamation based on false and defamatory
 9 statements that Musk made accusing Unsworth of being a pedophile and a child rapist.
 10 The discovery dispute before this Court arises from a previously undisclosed
 11 investigation into Unsworth by Musk.¹ Unsworth seeks an order from this Court
 12 compelling Musk to provide the following:

- 13 • Production of documents obtained during the previously undisclosed
 14 investigation, including the birth certificate/I.D. of Unsworth’s companion, Tik;
- 15 • Identification of the person(s) who conducted such investigation(s);
- 16 • Deposition of the investigator(s); and
- 17 • Production of a privilege log of all documents being withheld regarding
 18 any investigation into Unsworth.

19 These requests are clearly calculated to lead to the discovery of admissible
 20 evidence concerning falsity, negligence, and actual malice in this defamation case,
 21 particularly given Musk’s production of the results of a different investigation with
 22 respect to which he did not assert any privilege and the fact that he produced no
 23 documents evidencing communications by him regarding any investigation. Given
 24 the importance of this discovery dispute and the impasse between the parties on this
 25 issue, Unsworth reluctantly resorts to the Court’s intervention to resolve the dispute.

26
 27 ¹ As required by L.R. 37-1, the parties have had multiple telephonic and
 28 electronic meet and confer attempts to resolve this issue prior to seeking the Court’s
 intervention. *See* Declaration of G. Taylor Wilson (“Wilson Decl.”) at ¶¶ 2-3.

1 Musk's failure to disclose relevant individuals and information concerning his
 2 investigations into Unsworth has persisted throughout discovery. Musk failed to
 3 identify any individual who participated in any investigation into Unsworth in his
 4 initial disclosures. (*Id.* ¶ 6). Plaintiff first discovered the existence of an investigation
 5 of Unsworth undertaken by Howard in Musk's July 18 interrogatory responses. (*Id.*)²
 6 It was only upon review of Musk's first production of documents in this case that
 7 Unsworth discovered the identity of Jared Birchall ("Birchall"), a Musk associate who
 8 oversaw the Howard investigation at Musk's request. (*Id.* ¶¶ 6-7, 9, Ex. D (Birchall
 9 Depo. at 20:17-18)). After Unsworth sought to meet and confer, Musk identified by
 10 supplemental interrogatory responses Birchall, whose alleged oral communications
 11 with Musk as to the Howard investigation now form the principal basis for Musk's
 12 questionable motion for summary judgment. (*Id.* ¶¶ 5, 7).

13 During the deposition of Birchall on September 10, 2019, it was revealed that
 14 Birchall received from a different investigator the birth certificate of Unsworth's
 15 significant other, who is the person Musk falsely accused Unsworth of marrying when
 16 she was twelve years old. (*Id.* ¶ 10, Ex. D (Birchall Depo. at 216:7-218:1)). Although
 17 Musk did not possess any information to substantiate his twelve-year-old-bride claim
 18 in the first place, and in fact had contrary information, this birth certificate would
 19 make plain the age of Unsworth's significant other (40). Yet, Birchall was unable or
 20

21 ² Notably, Musk did not even disclose the fact that Howard's true identity is
 22 *Howard-Higgins* – an Englishman with a reported criminal history who was
 23 apparently incarcerated just months before he began working for Musk. (Wilson
 24 Decl. ¶ 15). Unsworth learned Howard's true name on August 23, 2019, with less
 25 than a month left in discovery, when Musk served a subpoena on Unsworth seeking
 26 production of any communications with "James Howard Higgins." (*Id.* ¶ 14). Notably,
 27 Howard claims in his written correspondence to have infiltrated the law firm
 28 of Unsworth's UK-based lawyers during his investigation to obtain insider
 information about Unsworth and his case. (*Id.* ¶ 16, Ex. F (MUSK_000203, 000205,
 000209)). Musk has provided no explanation for withholding Howard-Higgins' true
 identity, thereby frustrating Unsworth's ability to obtain discovery from him.

1 unwilling to disclose the identity of the person who provided the birth certificate,
 2 testifying “I believe it was derived through another, you know, relationship that was
 3 – that did involve a legal – legal counsel,” that the birth certificate was not provided
 4 by “a lawyer” but “someone working with a lawyer,” that he “do[es]n’t know the
 5 name of the person” but “could easily find that out,” and that he “do[es]n’t know if
 6 that lawyer was engaged to work on this matter.” (*Id.*). The identity of the individual
 7 who apparently conducted a second investigation into Unsworth, when that individual
 8 was retained for the stated purpose of “seeking verification,” the facts discovered in
 9 that investigation, and when those facts were disclosed to Birchall and/or Musk have
 10 never been identified by Musk in discovery despite both interrogatories and document
 11 requests calling for that information, which is relevant to falsity, negligence, and
 12 actual malice; the pending motion for summary judgment; and an eventual trial. (*Id.*
 13 ¶¶ 10-11, Ex. D (Birchall Depo. 217:24-218:1)). In response to Unsworth’s written
 14 discovery requests, Musk offered only boilerplate objections without stating whether
 15 any documents were, in fact, being withheld. (*Id.* ¶ 6, Ex. C).

16 Unsworth understood during e-mail and telephonic meet and confers that the
 17 birth certificate and identity of the person who provided it would be provided by
 18 Musk, but Musk has subsequently claimed that information is protected by the work
 19 product doctrine, again in boilerplate fashion. (*Id.* ¶ 12). Although Unsworth
 20 immediately requested a privilege log when Musk first asserted the privilege on
 21 September 22, Musk has never provided a privilege log during this case. (*Id.* ¶ 3, 13,
 22 Exs. A-B).

23 Having failed to disclose the existence of an apparent second investigation into
 24 Unsworth, the identity of the investigator, or a privilege log consistent with Rule 26,
 25 and moreover, having relied on the Howard investigation to support his defenses,
 26 Musk cannot now claim that this second investigation is shielded from discovery.
 27 Accordingly, Unsworth seeks a court order as set forth above, requiring Musk to (1)
 28 produce responsive non-privileged documents, particularly including Tik’s birth

1 certificate/ID card; (2) identify the investigator; (3) make the investigator available
 2 for a deposition; and (4) produce a privilege log of all documents prepared by, and
 3 communications with, the investigator. Unsworth further seeks sanctions in the form
 4 of his attorneys' fees and costs in litigating against Musk's frivolous positions on this
 5 issue.³

6 **B. Musk's Preliminary Statement**

7 This motion is born of Plaintiff Vernon Unsworth's desperation over the
 8 crumbling of his case. With Musk's summary judgment motion pending, and
 9 unable to counter Musk's showing that Unsworth cannot prove his case as to any of
 10 the statements at issue, Unsworth seeks to invade the work product of Musk's
 11 attorneys. There is no basis to do so. Unsworth is simply not entitled to discovery
 12 into the strategy of Musk's attorneys, the investigations they directed, or the facts
 13 that they uncovered in anticipation of threatened litigation.

14 This improper incursion into privileged information is the entirety of what
 15 Unsworth seeks through this motion. The information Unsworth is trying to obtain
 16 was the fruit of an investigation undertaken at the direction of Musk's counsel,
 17 which began on September 7, 2018, *after* one of Unsworth's attorneys, Lin Wood,
 18 had publicly posted on Twitter a litigation threat and demand letter. The
 19 investigator starting providing information to Musk's attorneys on September 11,
 20 2018, less than a week before Unsworth filed this lawsuit. Birchall Decl. at ¶ 5.
 21 These facts alone demonstrate that the requested information is protected work
 22

23 ³ Unsworth's portion of the stipulation that he delivered to Musk also raised a
 24 dispute regarding Musk's failure to produce a single document from his phone and
 25 iCloud, such as text messages. After Unsworth delivered his portion, he deposed
 26 Musk's third-party associates who themselves produced text messages with Musk
 27 that are responsive and relevant, and which Musk has not himself produced. In
 28 order to provide the Court with a fulsome record, and to give Musk the opportunity
 to explain his indisputable failure to produce relevant text messages, Unsworth has
 removed the dispute regarding text messages from this stipulation and he will
 instead address it another stipulation that will be provided to Musk.

1 product and not subject to discovery. Unsworth's lawyers know all of this.

2 Remarkably, they omitted it from their motion.

3 None of the relief Unsworth seeks has any basis in fact or law:

4 **First**, Unsworth cannot obtain a “production of documents” from the
 5 investigation directed by counsel. Even to the extent the documents or information
 6 sought are “factual” in nature, such “fact work product” remains protected unless a
 7 party has shown “substantial need” and “an inability to secure the substantial
 8 equivalent of the materials by alternate means.” Unsworth has not even attempted
 9 to make such a showing. Indeed, the one example he cites – the national identity
 10 card of Unsworth’s Thai “wife” – proves the point.⁴ Certainly he and his “wife”
 11 already have her national ID card, her birth certificate, and other proof of her age.
 12 And any factual information the investigator could have transmitted to Musk’s
 13 counsel about Unsworth, Unsworth already knows himself.

14 **Second**, for the same reasons, Unsworth is not entitled to the identity of the
 15 investigator nor to any deposition of him. The investigator is not a fact witness. He
 16 is the agent of the attorneys for whom he was working. The only case Unsworth
 17 cites in support of this argument stands for the unremarkable proposition that a party
 18 cannot withhold the identity of fact witnesses even if they were discovered through
 19 an investigation directed by counsel. That is not the issue here. Musk has disclosed
 20 any such witnesses. No case Unsworth cites allows a party to obtain discovery from
 21 a private investigator hired by counsel in anticipation of litigation or the identity of
 22 such investigator.

23 **Third**, Unsworth is not entitled to a detailed privilege log concerning the

24
 25
 26 ⁴ Musk offered to compromise on Unsworth’s requests regarding the investigator
 27 by providing him with Tik’s national identity card. Wilson Decl. Ex. A (September
 28 23, 2019 Email from Alex Spiro). Unsworth rejected this offer and demanded the
 additional relief sought in this motion. *Id.* (September 23, 2019 Email from L. Lin
 Wood).

1 investigator's work. Rule 26 does not require the logging of documents withheld for
 2 privilege, especially where doing so could reveal the strategy of counsel or other
 3 protected information. Musk has provided Unsworth all information necessary to
 4 evaluate the privilege claim: that the investigation was conducted at the direction of
 5 counsel, the date that his "wife's" national identity card was sent by the investigator
 6 to counsel, and the basis for its withholding. That is all that Rule 26 requires. *See*
 7 Wilson Decl. Ex. B. Moreover, there is no requirement of a log when litigation is
 8 imminent or after a complaint has been filed, which were the circumstances here.⁵

9 **Finally**, Unsworth's motion is faulty for other reasons. What Musk's counsel
 10 discovered through their own investigation after Musk made allegedly defamatory
 11 statements is not relevant to any claim or defense. Nonetheless, Musk produced the
 12 full files of a prior investigation conducted by a different investigator, Mr. Howard,
 13 because (a) it was not directed by counsel; and (b) it related to the basis for Musk's
 14 allegedly defamatory statements.⁶ Neither circumstance is present in the
 15 information Unsworth seeks by his motion. Moreover, Unsworth's motion is late.
 16 Fact discovery is over. Unsworth has been aware since July that Musk's attorney
 17 had directed an investigation of Unsworth, and Unsworth's attorneys asked
 18

19 ⁵ Notably, Unsworth has failed to do the very thing he demands here. He has
 20 produced **no** privilege log during the course of discovery in this case.

21 ⁶ Specifically, Howard reported to Musk that Unsworth was a fixture in Pattaya
 22 Beach, Thailand – a locale notorious for prostitution and child trafficking, that he
 23 had a taste for young Thai girls, that he whore-mongered his way through the go-go
 24 bars of Thailand, that his only friends were his "sexpat" peers, and that he married
 25 his Thai wife when she was a teenager, after starting a relationship when she was a
 26 young girl. Declaration of Jared Birchall in support of Musk's Motion for Summary
 27 Judgment [DKT 65] ("Birchall MSJ Decl.") at ¶¶ 18-19, Ex. E. Musk sent an email
 28 to BuzzFeed News repeating some of this information, making clear it could not
 publish any of his statements because they were "off the record." Declaration of
 Elon Musk in support of Musk's Motion for Summary Judgment [DKT 60] ("Musk
 MSJ Decl.") at ¶43, Ex. L. Those statements by Musk form the basis of part of
 Unsworth's defamation claim. Complaint, ¶¶ 88-97.

1 questions about it during depositions in August. Unsworth has no explanation for
 2 waiting weeks and weeks, until October and with summary judgment motions
 3 pending, to raise this dispute and to seek to invade the attorney work product of
 4 Musk's lawyers.

5 The Court should deny Unsworth's Motion to Compel in its entirety.

6 **II. DISCOVERY DISPUTES AT ISSUE**

7 **A. Unsworth's Verbatim Discovery Requests and Musk's Responses**

8 **Unsworth's Interrogatory Request and Musk's Response**

9 **INTERROGATORY NO. 3:**

10 Please identify every investigation, including every inquiry, analysis, or
 11 background check, concerning Plaintiff undertaken by you or any person on your
 12 behalf or for your benefit, including the dates of the investigation, the individuals who
 13 conducted or assisted with the investigation, a description of the work undertaken in
 14 the investigation, and a description of the investigation's findings.

15 **Responses and Objections to Interrogatory No. 3:**

16 Defendant incorporates his General Objections herein. Defendant further
 17 objects to Interrogatory No. 3 on the grounds that it is vague and ambiguous.
 18 Defendant further objects to Interrogatory No. 3 on the grounds that it is vague and
 19 ambiguous with regard to the terms "investigation," "inquiry," "analysis,"
 20 "background check," and "benefit." Defendant further objects to Interrogatory No. 3
 21 on the grounds that it seeks information that is outside of his possession, custody, or
 22 control, or that is equally available to Plaintiff. Defendant further objects to
 23 Interrogatory No. 3 on the grounds that it seeks information that is not relevant and
 24 not reasonably calculated to lead to the discovery of admissible evidence. Defendant
 25 further objects to Interrogatory No. 3 to the extent that it seeks to elicit information
 26 subject to and protected by the attorney-client privilege, the attorney work product
 27 doctrine, the joint defense privilege, the common interest doctrine, and/or any other
 28 applicable privilege or immunity. Defendant further objects to Interrogatory No. 3 on

1 the ground that it prematurely calls for the identification of expert witnesses or
2 testimony at this stage of litigation. Defendant further objects to Interrogatory No. 3
3 on the grounds that it is compound and comprises discrete subparts resulting in
4 separate interrogatories.

5 Subject to and without waiving the foregoing General Objections and Specific
6 Objections, and in accordance with Rule 33(d) of the Federal Rules of Civil
7 Procedure, Mr. Musk responds:

8 James Howard of Jupiter Military & Tactical Systems conducted an
9 investigation, beginning on or about August 15, 2018. Defendant will produce
10 documents relating to the work done and the findings of the investigation.

11 **Unsworth's Document Requests and Musk's Responses**

12 **REQUEST FOR PRODUCTION NO. 7:**

13 All documents and communications concerning or relating to any effort by you
14 or your representative to verify the truthfulness or accuracy of the Defamatory
15 Statements, whether before or after the Defamatory Statements were published.

16 **Responses and Objections to Request for Production No. 7:**

17 Defendant incorporates his General Objections herein. Defendant further
18 objects to Request No. 7 on the grounds that it seeks information that is outside of his
19 possession, custody, or control. Defendant further objects to Request No. 7 on the
20 grounds that it is vague and ambiguous with regard to the terms "representative,"
21 "verify," "accuracy," and "published." Defendant further objects to Request No. 7 as
22 argumentative in that it requires the adoption of improper assumptions including that
23 any statement referenced in this Request was defamatory. Defendant further objects
24 to Request No. 7 to the extent that it seeks to elicit information subject to and protected
25 by the attorney-client privilege, the attorney work product doctrine, the joint defense
26 privilege, the common interest doctrine, and/or any other applicable privilege or
27 immunity. Defendant further objects to Request No. 7 on the grounds that the Request

1 is overly broad and unduly burdensome and seeks documents that are not proportional
2 to the needs of the case.

3 Subject to his General and Specific Objections, Defendant responds as follows:

4 To the extent that such documents exist, are within Defendant's possession,
5 custody, or control, and can be located after a reasonably diligent inquiry, Defendant
6 will produce relevant, non-privileged documents responsive to this request, as
7 Defendant understands it.

8 **REQUEST FOR PRODUCTION NO. 8:**

9 All documents and communications concerning or relating to any investigation
10 concerning Plaintiff by you or by any person on your behalf.

11 **Responses and Objections to Request for Production No. 8:**

12 Defendant incorporates his General Objections herein. Defendant further
13 objects to Request No. 8 on the grounds that it seeks information that is outside of his
14 possession, custody, or control. Defendant further objects to Request No. 8 on the
15 grounds that it is vague and ambiguous with regard to the term "investigation."
16 Defendant further objects to Request No. 8 to the extent that it seeks to elicit
17 information subject to and protected by the attorney-client privilege, the attorney
18 work product doctrine, the joint defense privilege, the common interest doctrine,
19 and/or any other applicable privilege or immunity. Defendant further objects to
20 Request No. 8 on the grounds that the Request is overly broad and unduly burdensome
21 and seeks documents that are not proportional to the needs of the case.

22 Subject to his General and Specific Objections, Defendant responds as follows:

23 To the extent that such documents exist, are within Defendant's possession,
24 custody, or control, and can be located after a reasonably diligent inquiry, Defendant
25 will produce relevant, non-privileged documents responsive to this request, as
26 Defendant understands it.

27 **B. Unsworth's Position**

1 Unsworth seeks a supplemental response to interrogatory number three
2 identifying (1) the identity of the investigator who provided the birth certificate and
3 (2) the dates of the investigation. As the investigator's identity should have been
4 disclosed in Musk's July 18, 2019, interrogatory responses, Unsworth also seeks
5 permission to conduct a deposition of this investigator and/or the relevant members
6 of the investigator's team to discover the facts surrounding this investigation. Further,
7 Unsworth seeks a privilege log for the documents relating to the investigation and
8 responsive to requests for production seven and eight, both because the log will
9 contain information bearing on Musk's defenses, including a claim of no actual
10 malice, and it will allow for an assessment of the claim of privilege. A log is required,
11 and will, in any case, reveal the information sought by Unsworth in response to
12 interrogatory number three. Finally, Unsworth seeks sanctions in the form of
13 attorneys' fees for Musk's failure to abide by his discovery obligations in identifying
14 the investigator and producing a privilege log in the first place, and his stubborn
15 refusal to do so after substantial meet and confer efforts.

16 There appears to be no dispute that the information sought by Unsworth is
17 responsive and calculated to lead to the discovery of admissible evidence, but instead
18 only as to whether it is protected by the work product doctrine. Thus, Unsworth will
19 skip the litany of statements of law regarding the broad scope of discovery and focus
20 on the work product doctrine.

21 *First*, it is black letter law that Unsworth is entitled to disclosure of the identity
22 of the investigator(s) and dates of the investigation(s), as neither constitutes work
23 product. *See, e.g., Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Systems,*
24 *Inc.*, 2005 WL 1459555, at *4 (N.D. Cal., June 21, 2005) ("It is generally accepted
25 that the 'work product doctrine does not protect against the disclosure of facts or the
26 identity of persons from whom the facts are learned.'") (internal citations omitted).
27 Thus, pretermitted whether any documents and communications concerning this
28 investigation even qualify as work product prepared in anticipation of litigation, the

1 identity and location of individuals possessing relevant knowledge are not work
 2 product, and no showing of substantial need is required to obtain this information.
 3 *See, e.g., Burlingame v. County of Calaveras*, 2007 WL 2669523, at *2 (E.D. Cal.,
 4 Sept. 7, 2007) (discussing difference between “opinion work product” and “fact work
 5 product” and stating that “while work product immunity protects documents and
 6 tangible things, it generally does not protect the underlying facts contained within the
 7 document or tangible thing,” and noting that “the identity and location of persons
 8 having knowledge of any discoverable matter are discoverable”). For the same
 9 reason, the dates on which this investigation was undertaken are not protected; this is
 10 merely a fact underlying the investigation and does not require the production of any
 11 arguably protected tangible materials. Indeed, as set forth below, the identity of the
 12 investigator and dates of the investigation are the precise type of information which
 13 would have to be provided via a privilege log or other compliant claim of privilege.

14 *Second*, Musk must produce a privilege log or its substantial equivalent
 15 consistent with the mandates of Fed. R. Civ. P. 26(b)(5), which provides that “[w]hen
 16 a party withholds information otherwise discoverable by claiming that the information
 17 is privileged or subject to protection as trial-preparation material, the party must: ...
 18 (i) expressly make the claim; and ... (ii) describe the nature of the documents,
 19 communications, or tangible things not produce or disclosed ... in a manner that,
 20 without revealing information itself privileged or protected, will enable other parties
 21 to assess the claim.” Notably, a “party’s ‘failure to provide sufficient information
 22 may constitute a waiver of the privilege.’” *Friends of Hope Valley v. Frederick Co.*,
 23 268 F.R.D. 643, 650 (E.D. Cal. 2010) (internal citation omitted).

24 The information required to be contained in the privilege log is all that
 25 Unsworth requests in response to his interrogatories. “A judge of this court has stated
 26 that ‘[t]he requisite detail for inclusion in a privilege log consists of [1] a description
 27 of responsive material withheld, [2] the identity and position of its author, [3] the date
 28 it was written, [4] the identity and position of all addressees and recipients, [5] the

1 material's present location, [6] the specific reasons for its being withheld, including
 2 the privilege invoked and grounds thereof." *Id.* at 650-51 (internal citations omitted).
 3 To date, Musk has stated – late in the meet and confer process – only that “we have
 4 reached the conclusion it [the information sought by Unsworth] is privileged and so
 5 we are not providing it,” and that “Mr. Birchall received the document [the national
 6 ID card] on Sept 11th... We are under no obligation to produce a detailed privilege
 7 log related to the activities of counsel ... We have provided sufficient information for
 8 you to evaluate our claim of work product protection, including the date of the
 9 communication and the basis for the claim of privilege. ... The identity of any
 10 investigator is irrelevant and has no bearing on any legal issue.” (Wilson Decl. ¶ 3).
 11 As held in *Friends of Hope Valley*, Musk’s vague boilerplate claims of privilege
 12 within his response to Unsworth’s requests for production and in meet and confer
 13 correspondence do not meet the requirements of Fed. R. Civ. P. 26. *Friends of Hope*
 14 *Valley*, 268 F.R.D at 651 (“One of plaintiff’s meet-and-confer letters explains that all
 15 of these non-attorney communications ‘related directly to forming a response to a
 16 query provided by an attorney or precede and relate to forming a communication to
 17 an attorney.’ However, defendant and the court should not be obligated to take
 18 plaintiff’s blanket assertion at face value as to all the documents withheld.”). *See also*
 19 *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. Of Mont.*, 408
 20 F.3d 1142, 1149 (9th Cir. 2005) (establishing this Circuit’s rules for waiver of
 21 privilege by failure to timely assert the privilege and stating “[w]e hold that boilerplate
 22 objections or blanket refusals inserted into a response to a Rule 34 request for
 23 production of documents are insufficient to assert a privilege”). This is especially so
 24 because Unsworth is still unaware of the scope of the investigation and the extent of
 25 any documents and communications for which Musk now claims protection.

26 *Third*, Unsworth is entitled to depose the investigator and/or relevant members
 27 of the investigator’s team to reveal the facts discovered in the investigation as well as
 28 how those facts bear on Musk’s stated actual malice defense. Indeed, Birchall has

1 testified with respect to his receipt of this birth certificate that “[w]e may have been
 2 looking for verification.” (Wilson Decl. ¶ 10, Ex. D (Birchall Depo. 217:24-218:1)).
 3 If Musk was “looking for verification” beyond the Howard investigation to determine
 4 the age of Unsworth’s significant other, such an effort is circumstantial evidence of
 5 among other things, his state of mind. Moreover, even if confirmation of her age was
 6 disclosed to Musk or Birchall after Musk’s accusations to BuzzFeed, it bears on his
 7 state of mind in continuing to permit without correction the republication of his false
 8 accusations. Regardless, at a minimum, Unsworth’s discovery requests are
 9 reasonably calculated to lead to the discovery of admissible evidence, the evidence
 10 sought is not protected by the work product doctrine, and Musk is not entitled to shield
 11 from Unsworth a second investigation on vague claims of privilege. It is clear that
 12 Musk has demonstrated a pattern of hiding and delaying disclosure of the facts about
 13 his investigations into, and thus knowledge about, Unsworth. But for Musk’s failure
 14 to identify the investigator, Unsworth would have deposed this investigator within the
 15 discovery period.⁷

16 **C. Musk’s Position**

17 **1. Unsworth misstates the facts.**

18 Unsworth’s section of the joint stipulation is rife with factual misstatements,
 19 the more significant of which are as follows:

20
 21
 22 ⁷ Unsworth continues to believe that he is entitled to the documents and
 23 communications themselves, including because it is unclear if they were created in
 24 anticipation of litigation based upon Birchall’s testimony, because Unsworth has a
 25 substantial need for the documents, and because Musk has waived his right to assert
 26 the protection of the work product doctrine. In compliance with L.R. 37-2.1,
 27 Unsworth proposed to compromise by receiving a privilege log to assess the merits
 28 of the privilege assertion rather than seeking production of the investigator’s
 documents and communications themselves. Thus, because there is no further
 compromise, Unsworth seeks here that privilege log so that he and the Court can
 assess the privilege assertion.

1 First, Unsworth's statement that Musk's "failure to disclose relevant
2 individuals and information concerning his investigations into Unsworth has
3 persisted throughout discovery" is false. It is also ironic given that Unsworth
4 himself has persistently refused to produce relevant, non-privileged information.
5 For example:

- Unsworth's alleged Thai "wife," Tik, testified in deposition that she and Unsworth communicate through WhatsApp and Line. Yet, Unsworth has not produced a single chat log or document related to those communications on either application. In fact, Unsworth has produced only three emails between him and Tik. He has produced no other electronic communications between the two of them. Lifrak Decl. Ex. 2.
- Unsworth belatedly produced 100 pages of key documents over a month *after* his deposition and several weeks *after* the discovery cutoff. The production included text messages between Unsworth and his British wife, Vanessa. *Id.*.
- Unsworth's belated production identifies 632 photographs, 12 video files, and 37 other files, which he has refused to produce. *Id.*
- Unsworth has failed to produce numerous communications between him and his agent, studios, and others that reflect his persistent efforts to cash in on his fame from the role he played in the cave rescue. *Id.*⁸

20 Second, Musk did not “fail” to identify in his Rule 26 initial disclosures either
21 Howard or any other investigator. Rule 26 requires the identification of witnesses
22 “that the disclosing party may use to support its claims or defenses.” Fed. R. Civ. P.
23 26(a)(1)(A)(i). Musk does not plan to call Howard or any other investigator as a
24 witness at trial or otherwise. As noted above, Musk readily produced all documents
25 regarding Howard’s investigation (including all his communications with Birchall)

27 ⁸ Unsworth's attorneys have refused to reconsider their position on these issues.
28 As a result, Musk reserves his right to file a separate motion to compel, as discussed
further below.

1 because the investigation was not directed by counsel and formed the basis for some
 2 of Musk's allegedly defamatory statements. Lifrak Decl. at ¶ 5.

3 Third, Unsworth blames Musk for the fact that the full name of James
 4 Howard-Higgins was unknown to him until August 23, 2019. However, Musk
 5 never became aware of the "Higgins" portion of Howard's name during his
 6 investigation because Howard/Howard-Higgins did not use it in any reports or
 7 correspondence. More importantly, the lawyers at one of Unsworth's law firms
 8 know Howard/Howard-Higgins and have even spoken to him about the case.
 9 Wilson Decl. Ex. H (at MUSK000205, 208-09). Thus, the notion that his true
 10 identity has been "hidden" is laughable.

11 Fourth, Unsworth's assertion that Musk "hid" the existence of counsel's later
 12 investigation from him is incorrect. Documents produced by Musk on July 17, 2019
 13 evidence Birchall telling Howard that he had obtained Tik's "birth record" via other
 14 means. Lifrak Decl. Ex. 3. Unsworth's counsel was aware of this, sufficiently so
 15 to question Birchall about it at his deposition. Wilson Decl., Ex. D (Birchall Depo.
 16 216: 7-9).

17 **2. Unsworth is not entitled to production of attorney work**
 18 **product.**

19 All of the information Unsworth seeks to obtain through this Motion to
 20 Compel is attorney work product created in anticipation of litigation. The facts are
 21 not disputed:

- 22 • Birchall hired Howard on August 15, 2018. Birchall MSJ Decl. at ¶ 4.
- 23 • Howard reported highly negative information to Birchall throughout
 August 2018. *Id.* at ¶¶ 11-19.
- 24 • Musk repeated some of that information in an email to BuzzFeed
 News, with the statement that it was "off-the-record." BuzzFeed
 published the email anyway, and Unsworth sued Musk as a result.
 Musk MSJ Decl. at ¶ 43.

- Musk has produced all communications with Howard. Lifrak Decl. ¶ 5.
- On August 28, 2018, Unsworth's counsel, Lin Wood, tweeted a demand letter to Musk. Lifrak Decl. Ex. 4.
- On September 7, 2018, Musk's counsel at Cooley hired the investigator whose information Unsworth now seeks. Birchall Decl. ¶ 4.
- The investigator provided Tik's national identity card to Cooley and Birchall on September 11, 2018. Birchall Decl. ¶ 5.

Because the investigator was working for Cooley in preparation for litigation (which Unsworth had already publicly threatened and was a week away from filing), the investigator is an agent of the attorney. His work and the fruits thereof are protected by the attorney work product doctrine ***to the same extent an attorney's work would be protected.*** *See Coito v. Superior Court*, 54 Cal. 4th 480, 488 (2012) (“material created by or derived from an attorney’s work reflecting the attorney’s evaluation of the law or facts” including “witness statements obtained as a result of interviews conducted by an attorney, or by an attorney’s agent at the attorney’s behest, constitute work product protected by section 2018.030.”); *see also United States v. Nobles*, 422 U.S. 225, 238–39 (1975) (the attorney work product “doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”); *People v. Superior Court (Jones)*, 34 Cal. App. 5th 75, 81 (2019), *review granted July 24, 2019 No. S255826* (“California’s work product protection exists to encourage attorneys to thoroughly prepare their cases for trial and to investigate the favorable and unfavorable aspects of their cases, as well as to prevent attorneys from ‘taking undue advantage of their adversary’s industry and efforts,’” and work product “includes materials compiled by investigators and other agents in preparation for

1 trial.”). The production of materials created during or found as a result of the
 2 Cooley-led investigation are therefore not discoverable.

3 Moreover, contrary to Unsworth’s position, factual material obtained during
 4 the investigation, such as Tik’s national ID card, is also protected work product
 5 because the release of documents containing such factual information would
 6 necessarily require production of “material created by or derived from an attorney’s
 7 work reflecting the attorney’s evaluation of the law or facts.” *Coito*, 54 Cal. 4th at
 8 488.

9 The case Unsworth relies on, *Burlingame v. County of Calaveras*, 2007 WL
 10 2669523 (E.D. Cal., Sept. 7, 2007), does not suggest otherwise. That case makes
 11 clear that factual information that is part of protected communications is
 12 discoverable *only* when it is unavailable via alternative means, an aspect of the case
 13 Unsworth failed to mention. *See id.* (“fact work product” can be ordered produced
 14 only “if the requesting party demonstrates both a ‘substantial need’ and ‘an inability
 15 to secure the substantial equivalent of the materials by alternate means without
 16 undue hardship” (citations omitted)); *see also* F.R.C.P 26(b)(3). Moreover, the
 17 court in *Burlingame* denied the motion to compel for this very reason – the moving
 18 party did not demonstrate substantial need and a lack of alternative means for
 19 obtaining the information. *See Burlingame* at *3. Here, Unsworth has access to
 20 Tik’s national identity card or other proof of her birthday, and he does not need to
 21 demand it from Musk. The same holds true for the other factual information the
 22 investigator uncovered regarding Unsworth. Unsworth already knows about
 23 himself, and the information is otherwise available (or else the investigator could
 24 not have obtained it).

25 **3. Unsworth is not entitled to a deposition of the investigator or**
 26 **his identity.**

27 For the same reasons, any request to obtain information from the investigator
 28 through a deposition is also improper. An agent cannot be deposed unless an

1 attorney standing in the same shoes could be deposed. *Daniels v. Hadley Mem'l*
 2 *Hosp.*, 68 F.R.D. 583, 588 (D.D.C. 1975). Here, Unsworth has not even attempted
 3 to make such a showing. Nor could he, as he would have to demonstrate that "no
 4 other means exist to obtain the information than to depose opposing counsel" and
 5 "the information sought is ... nonprivileged." *Littlefield v. Nutribullet, LLC*, 2017
 6 WL 10438897, at *3 (C.D. Cal. Nov. 7, 2017). Unsworth has not and cannot
 7 demonstrate either.

8 Nor does any basis exist for Unsworth to discover the identity of the
 9 investigator. The only case Unsworth cites for this proposition, *Plumbers &*
 10 *Pipefitters Local 572 Pension Fund*, 2005 WL 145955 (N.D. Cal June 21, 2005),
 11 held simply that a party can be compelled to "disclose the identity of persons having
 12 knowledge" of relevant facts, even if they had been interviewed by counsel. *Id.* at
 13 *4. The investigator here, however, is not a fact witness, unlike the individuals at
 14 issue in *Plumbers*, and has no first-hand knowledge of anything. Musk has already
 15 timely disclosed all of the witnesses who do.

16 Moreover, Unsworth does not need to know the name of the investigator
 17 Musk's counsel, Cooley, hired in order to evaluate the claim of privilege asserted
 18 over the investigation materials. Rule 26(b)(5)(a) requires the disclosure only of
 19 information sufficient to "enable other parties to assess the claim" of privilege. The
 20 name of an investigator does not render the investigator's findings any more or less
 21 privileged.

22 **4. Unsworth has sufficient information to assess Musk's**
 23 **privilege claim.**

24 Musk is not required to produce a privilege "log" concerning the
 25 investigation. As noted above, Rule 26 requires that Musk "describe the nature of
 26 the documents, communications, or tangible things not produced or disclosed" in a
 27 "manner that, without revealing information itself privileged or protected, will
 28 enable other parties to assess the claim." See F.R.C.P. 26(b)(5)(a). A privilege log

1 is simply one way to enable a party to assess the claim of privilege. *See Hully*
 2 *Enters. v. Baker Botts LLP*, 286 F. Supp. 3d 1, 7 (D.D.C. 2017) (“[W]hen a
 3 discovery request demands production of an attorney’s records in connection with
 4 representation of a client, invocation of the protections of the attorney-client
 5 privilege and work-product doctrine may be effective without requiring a detailed
 6 privilege log. Otherwise, any objection to the scope of a discovery demand would
 7 be rendered moot because interposing that objection would trigger the very
 8 burdensome obligation to prepare a privilege log that the objection would be
 9 intended to avoid.”).

10 Even the case Unsworth cites, *Friends of Hope Valley v. Frederick Co.*, does
 11 not hold otherwise. *See* 268 F.R.D. 643, 651 (E.D. Cal. 2010) (“[W]hether the
 12 requisite information [necessary to assess privilege] is provided in a particular
 13 format is not dispositive.”).⁹ Musk has provided Unsworth all information
 14 necessary to evaluate the privilege claim: (1) the date the investigation began, (2)
 15 that it was conducted at the direction of counsel, (3) the date the investigator sent a
 16 copy of Tik’s national identity card to Cooley, (4) that it was a national identity
 17 card, and, (5) the basis for its withholding. That is all Rule 26 requires. Unsworth
 18 has all of the information he needs to assess the privilege claim.

19

20 ⁹ In *Friend of Hope Valley*, the court did *not* indicate that a privilege log is the only
 21 acceptable way to communicate information that would allow an opposing party to
 22 assess a claim of privilege. Further, and most importantly, the communications at
 23 issue in *Friends of Hope Valley* were among non-attorneys. Plaintiff’s privilege log
 24 was deficient because it did not allow the Court to assess why “communications
 25 among non-attorneys” were privileged. The subject of Unsworth’s discovery
 26 request—for communications and documents transmitted from an attorney’s agent
 27 to an attorney—is not analogous. *Id.* Finally, in *Friends of Hope Valley*, plaintiff
 28 “just copied the subject line from the e-mail or letter withheld,” which was not
 enough information for the Court or the opposing party to assess the claim of
 privilege. *Id.* Musk has provided significantly more information, including the
 nature of the document withheld, the date it was received, and that it was transmitted
 from the investigator to Cooley in preparation for this litigation.

1 Moreover, most jurisdictions, including this one, do not require the logging of
 2 privileged materials created when litigation is imminent or after a complaint has
 3 been filed. *See In re Snap Inc. Sec. Litig.*, 2018 WL 7501294, at *1 (C.D. Cal. Nov.
 4 29, 2018) (“Courts in this circuit routinely deny a motion to compel a privilege log
 5 of attorney-client communications or work product dated after commencement of
 6 litigation.”); *Frye v. Dan Ryan Builders, Inc.*, 2011 WL 666326, at *7 (N.D.W.Va.
 7 Feb. 11, 2011) (party did not have to produce a privilege log for its litigation file).

8 **5. The information sought is irrelevant.**

9 The information Unsworth demands is not discoverable. It is not “relevant to
 10 any party’s claim or defense” within the meaning of Federal Rule of Civil Procedure
 11 26(b)(1). “The party moving to compel bears the burden of demonstrating why the
 12 information sought is relevant and why the responding party’s objections lack
 13 merit.” *Saucedo v. McKesson Med.-Surgical, Inc.*, 2017 WL 10591593, at *2 (C.D.
 14 Cal. June 2, 2017). Unsworth has not met his burden of showing the requested
 15 information is relevant to any claim or defense in this case.

16 As explained above, Musk, via counsel, did not receive any information from
 17 the investigator until September 11, 2018. This was two weeks after Musk made his
 18 allegedly defamatory statements. What Musk’s counsel may have learned about
 19 Unsworth after the fact has no bearing on Musk’s statements weeks earlier or to
 20 whether they were made with actual malice. *See e.g., Saucedo*, 2017 WL 10591593,
 21 at *3 (denying plaintiffs’ discovery request because “[p]laintiff’s Requests for
 22 Production are not ‘relevant to any party’s claim or defense’” (citing Fed. R. Civ. P.
 23 26(b)(1)); *Manigo v. Time Warner Cable, Inc.*, 2016 WL 9281314, at *4 (C.D. Cal.
 24 Dec. 29, 2016) (denying plaintiffs’ discovery request where “[p]laintiffs have made
 25 no showing that the requested information is relevant to any party’s claim or
 26 defense”).

27 **6. Unsworth’s motion is untimely.**

28 Musk produced documents on July 17, 2019, which included communications

1 between Birchall and Howard and referenced a separate investigation—the
 2 investigation that is now the subject of this motion. Musk Decl. Ex. 2. Unsworth
 3 questioned Birchall about this investigation at Birchall’s August deposition, and
 4 Birchall made clear that the investigation was conducted at the behest of counsel.
 5 Wilson Decl. Ex. D (Birchall Depo. 216:17 – 217:21).

6 The discovery cutoff was September 13. *See* Joint Rule 26 Report [DKT 54].
 7 Musk filed his summary judgment motion on September 16. [DKT 58]. On the
 8 same day, the parties submitted a joint stipulation (which Judge Wilson has since
 9 approved) that Unsworth could take a handful of depositions after the cutoff. That
 10 document made clear that “[t]he Parties have agreed that they will not seek any
 11 other depositions except those set forth herein absent exceptional circumstances.”
 12 [DKT 64]. Unsworth said nothing about the investigator issue until September 17.
 13 Wilson Decl. at Ex. A. It is now October, and discovery has closed.
 14 Musk did not hide anything from Unsworth. Unsworth was aware of this issue
 15 months ago. The fact that he waited until after the discovery cutoff to raise it makes
 16 it untimely.¹⁰ District courts “take an active role to ensure that discovery deadlines
 17 are adhered to by the parties.” *Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*,
 18 2017 WL 10339007, at *2 (C.D. Cal. Aug. 9, 2017). As several courts have held,
 19 “compliance with the discovery cutoff requires motions to compel be filed and heard
 20 sufficiently in advance of the cutoff so that the Court [can] grant effective relief
 21 within the allotted discovery time.” (*Id.*) (citing cases).

22

23 ¹⁰ Musk reserves his right to move to compel the outstanding discovery from
 24 Unsworth as outlined herein. Musk’s motion will be based upon information culled
 25 from documents Musk has demanded for months, which Unsworth finally produced
 26 after the September 16 discovery cutoff, on September 23, 2019. Lifrak Decl. Ex. 5.
 27 Musk had no way of knowing that these new materials would indicate even more
 28 withheld documents existed. Indeed, by way of example, Unsworth testified at his
 deposition that he did not have an agent. However, the September 23 production
 proved this was false – Unsworth did in fact have an agent, and had corresponded
 with his agent extensively. Lifrak Decl. Exs. 6, 7.

1 DATED: October 14, 2019

Respectfully submitted,
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3

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Pursuant to L.R. 5-4.3.4(a)(2)(i), the filer hereby attests that all signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

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